

Moving Europe towards a sustainable and  
safe railway system without frontiers.

## OPINION

*ERA/OPI/2022-10*

## OF THE EUROPEAN UNION AGENCY FOR RAILWAYS

for

Austria

regarding

Adopted national rules imposing requirements related to the  
operational manager-‘Betriebsleiter’

### Disclaimer:

The present document is a non-legally binding opinion of the European Union Agency for Railways. It does not represent the view of other EU institutions and bodies, and is without prejudice to the decision-making processes foreseen by the applicable EU legislation. Furthermore, a binding interpretation of EU law is the sole competence of the Court of Justice of the European Union.

## 1. General Context

This opinion is addressed to Austria with a copy to the European Commission.

In line with Article 8 of Directive (EU) 2016/798 (Railway Safety Directive) and with Article 26 of Regulation (EU) 2016/796, this opinion covers the examination by the European Union Agency for Railways (hereinafter the Agency) of the national rules adopted by Austria regulating the requirements for qualification of the operations manager (Betriebsleiter) leading to a negative assessment.

The Agency sent a letter on 04.03.2021 to the Austrian NSA (National Safety Authority, hereinafter BMK) on this subject. The Agency's preliminary opinion as expressed in this letter was that the following Austrian notified legal documents and references were not in line with the EU legal framework:

- Railway Act 1957 (EisbG, version 25.01.2021): §21.
- Railway Regulation 2003 (EisbVO 2003, version 25.01.2021): §9, §10, §11, §13 and §14.
- Railway Workers' protection Ordinance (EisbAV, version 25.01.2021): Annex 3.

BMK replied to the Agency that requirements defined in the EisbVO on the 'Betriebsleiter' qualification were covered in EU legislation and that this topic has been already part of national legislation since 1957, updated in 2003 (version 25.01.2021) and notified as national rule conform to Art. 8 of Directive 2016/798. The national rule falls also under protection of workers conform Directive 89/391/EEC.

The final position of Austria was received by email on 16.09.2022 with a reference to the letter already received on 31.03.2021.

## 2. Legal Background

Article 26 (3) of Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004<sup>1</sup> (Agency Regulation) sets out the following:

*Where the examination referred to in paragraph 1 leads to a negative assessment, the Agency shall inform the Member State concerned and ask it to state its position regarding that assessment. If, following that exchange of views with the Member State concerned, the Agency maintains its negative assessment, the Agency shall within a maximum period of 1 month:*

*(a) issue an opinion addressed to the Member State concerned, stating that the national rule or rules in question has or have been the subject of a negative assessment and the reasons why the rule or rules in question should be modified or repealed; and*

*(b) inform the Commission of its negative assessment, stating the reasons why the national rule or rules in question should be modified or repealed.*

This opinion is issued pursuant to Article 26 (3) of the Regulation (EU) 2016/796.

This opinion points out the fact that the adopted national rules of Austria contradict already harmonised European legislation according to the analysis and the Annex to this opinion.

The applicable EU legislation which is relevant for this opinion is:

- Directive (EU) 2016/798 of 11 May 2016 on railway safety;
- Commission Implementing Regulation (EU) 2019/773 of 16 May 2019 on the technical specification for interoperability relating to the operation and traffic management subsystem of the rail system within the European Union and repealing Decision 2012/757 EU;

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<sup>1</sup> OJ L 138, 26.5.2016, p. 1.

- Commission delegated Regulation (EU) 2018/762 of 8 March 2018 establishing common safety methods on safety management system requirements pursuant to Directive (EU) 2016/798 of the European Parliament and of the Council and repealing Commission Regulations (EU) No 1158/2010 and (EU) No 1169/2010;
- Commission Delegated Regulation (EU) 2018/761 of 16 February 2018 establishing common safety methods for supervision by national safety authorities after the issue of a single safety certificate or a safety authorisation pursuant to Directive (EU) 2016/798 of the European Parliament and of the Council and repealing Commission Regulation (EU) No 1077/2012;
- Commission Implementing Regulation (EU) 2015/1136 of 13 July 2015 amending Implementing Regulation (EU) No 402/2013 on the common safety method for risk evaluation and assessment.

### 3. Analysis

As part of the assessment of the national safety rules under Article 8 of Directive (EU) 2016/798 in conjunction with article 26 of Regulation (EU) 2016/796, the Agency received from BMK an excel file (latest version sent on 16.09.2022). This file contains references among others to the national rules adopted by Austria regulating the assessment of the elements set out in point (b) of paragraph 3 of Article 10 of Directive (EU) 2016/798.

Pending completion of its analysis, the Agency has identified that specific rules in the excel file refer to the several legal documents<sup>2</sup> containing requirements on the qualification of the operations manager (Betriebsleiter). These legal acts define the mandatory requirements for the qualification of the 'Betriebsleiter' and the procedure for obtaining and maintaining such a qualification.

The requirements on the 'Betriebsleiter' laid down in the legal acts define the following:

- The basic and technical knowledge, training content and training hours
- The appointment of at least one 'Betriebsleiter' and one deputy
- The mandatory approval of the authority and the to be followed process to receive this approval (list of application documents to be submitted)
- The tasks and responsibilities
- The mandatory annual reporting on activities

Directive (EU) 2016/798 permits in principle type 5 rules. However, all national rules shall not contradict EU law. Under this light, the specific requirements in the Austrian rules underwent an additional compatibility check against Regulations (EU) 2018/762 and (EU) 2019/773.

Annex I point 4.2 of Regulation (EU) 2018/762 stipulates:

"4.2.1" The organisation's competence management system shall ensure that staff having a role that affects safety competent in the safety-related tasks for which they are responsible (see 2.3. Organisational roles, responsibilities, accountabilities and authorities), including at least:

- (a) identification of the competencies (including knowledge, skills, non-technical behaviours and attitudes) required for safety-related tasks;
- (b) selection principles (basic educational level, psychological and physical fitness required);
- (c) initial training, experience and qualification;
- (d) ongoing training and periodic update of existing competencies;

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<sup>2</sup> Railway Act 1957 (EisbG, version 25.01.2021): §21; Railway Regulation 2003 (EisbVO 2003, version 25.01.2021): §9, §10, §11, §13 and §14; Railway Workers' protection Ordinance (EisbAV, version 25.01.2021): Annex 3.

- (e) periodic assessment of competence and checks of psychological and physical fitness to ensure that qualifications and skills are maintained over time;
- (f) specific training in relevant parts of the safety management system in order to deliver their safety-related tasks.

“4.2.2” The organisation shall provide a training programme, as referred to in points (c), (d) and (f) of paragraph 4.2.1, for staff performing safety-related tasks which ensures that:

- (a) the training programme is delivered according to the identified competency requirements and individual needs of the staff;
- (b) where applicable, the training ensures that staff can operate under all operating conditions (normal, degraded and emergency);
- (c) the duration of the training and the frequency of the refresher training are appropriate for the training objectives;
- (d) records are kept for all staff (see 4.5.3. Control of documented information);
- (e) the training programme is regularly reviewed and audited (see 6.2. Internal auditing) and changes made when necessary (see 5.4. Management of change).

“4.2.3” Back to work arrangements shall be in place for staff following accidents/incidents or long absences from work, including providing additional training where such a need is identified.

Requirements on leadership and commitment to the safety management system are even so laid down in Annex I point 2.1 of the Regulation (EU) 2018/762.

In other words Annex I point 4.2 to Regulation (EU) 2018/762 requires that the competence requirements for staff carrying out safety-related tasks is managed but only under the Safety Management System (SMS) of the Railway Undertaking (RU) – a contrario not at the Member State level through a national rule.

Therefore, railway undertakings are the only ones according to the applicable EU law to define, as part of their SMS, the roles and responsibilities of those carrying out safety-related tasks, identify the relevant competencies and establish training programmes to develop and maintain their competencies.

In addition, The Technical Specifications for Interoperability for the Operation and Traffic Management (TSI OPE), in section 4.6 of its Annex, also defines that the initial and ongoing assessment of staff and the analysis and update of training needs is part of the requirements in the safety management system in line with Regulation (EU) 2018/762. This is because risk assessment and the operational context need to be fully considered by a railway undertaking to identify and to manage the competency requirements for staff carrying out safety-related tasks.

It is therefore an exclusive task of the railway undertaking to decide on the deeper content of safety-related tasks, as this is highly dependent on each railway undertaking’s operational context and each railway undertaking’s specific and tailored-made risk evaluation and assessment. The Member State has no right to substitute the RU’s obligation and right to define the requirements.

The matter of staff competencies is a crucial responsibility of each railway undertaking operating in the Single European Railway Area. It shall be well included in the Safety Management System of each railway undertaking as the proper identification of risks and their mitigation is of great importance for safe operations.

Under this light, the National safety Authorities of the EU Member States shall apply the relevant EU law on supervision and in particular the Commission Delegated Regulation (EU) 2018/761 establishing common safety methods for supervision by national safety authorities, to verify through their supervision activities the ability of the railway undertaking’s Safety Management Systems to function properly and address all relevant risks, including those arising from the human and organisational factors and impacting the competence management system.

Assuming that risks can be generated within hazardous situations related to the activities carried out by the organization, it should be noted that the main scope of an SMS (Safety Management System) is to manage and control risks with the aim of making rail transport as safest as possible.

Please, consider the following articles from the Railway Safety Directive 2016/798:

*ART 3*

*(9) 'safety management system' means the organisation, arrangements and procedures established by an infrastructure manager or a railway undertaking to ensure the safe management of its operations;*

*ART 4*

*3. Railway undertakings and infrastructure managers shall: (a) implement the necessary risk control measures referred to in point (a) of Article 6(1), where appropriate in cooperation with each other and with other actors; (b) take account in their safety management systems of the risks associated with the activities of other actors and third parties; (c) where appropriate, contractually oblige the other actors referred to in paragraph 4 having a potential impact on the safe operation of the Union rail system to implement risk control measures; and (d) ensure that their contractors implement risk control measures through the application of the CSMs for monitoring processes set out in the CSMs on monitoring referred to in point (c) of Article 6(1), and that this is stipulated in contractual arrangements to be disclosed on request of the Agency or of the national safety authority.*

*ART 9*

*4. The safety management system shall be adapted to the type, extent, area of operations and other conditions of the activity pursued. It shall ensure the control of all risks associated with the activity of the infrastructure manager or railway undertaking, including the supply of maintenance, without prejudice to Article 14, and material, and the use of contractors. Without prejudice to existing national and international liability rules, the safety management system shall also take into account, where appropriate and reasonable, the risks arising as a result of activities by other actors referred to in Article 4.*

With a systematic interpretation of the aforementioned legal provisions, certain safety and operational responsibilities cannot be appointed to one person/function. Responsibilities for risk management are appointed to the organization.

Finally, the purpose of the SMS is to ensure that the railway undertakings and infrastructure managers achieve their business objectives in a safe manner. How objectives are met with the relevant safety level, is a responsibility of the organisation itself. The organisation sets the business objectives and manages the operational risks and therefore they should collectively hold the responsibility of ensuring that everything is in place to manage and monitor the safe operation.

As a conclusion, the Agency's opinion is that such operation manager (Betriebsleiter) requirements should be part of a risk-based approach that is company-specific.

#### 4. The opinion

The Agency considers that the adopted national safety rules, namely:

- Railway Act 1957 (EisbG, version 25.01.2021): §21.
- Railway Regulation 2003 (EisbVO 2003, version 25.01.2021): §9, §10, §11, §13 and §14.
- Railway Workers' protection Ordinance (EisbAV, version 25.01.2021): Annex 3.

are not compliant with the relevant EU legal requirements as described in the analysis. In accordance with article 26 (3) of Regulation 2016/796, the opinion covers the examination of adopted national rules of Austria by the Agency leading to a negative assessment.

This opinion is addressed to Austria, with a copy to the European Commission (DG MOVE).

Valenciennes,

Signed

Josef DOPPELBAUER  
Executive Director

# Annex 1

## Impact Note

*Adopted national rules imposing requirements related to the operational manager-‘Betriebsleiter’*

Issued as per Art. 8(1) of Regulation (EU) 2016/796 and the Impact Assessment procedure adopted by the ERA Management Board (Decision n.290, 16/03/2022)

<b>1. Context and assessment of impacts</b>
<b>1.1. The national rule in object</b>
<p>As part of the assessment of the national safety rules under Article 8 of Directive (EU) 2016/798 in conjunction with article 26 of Regulation (EU) 2016/796, the Agency received from the Austrian NSA (National Safety Authority) an excel file containing references among others to the national rules adopted by Austria regulating the requirements for the qualification of the ‘Betriebsleiter’ and the procedure for obtaining and maintaining such a qualification.</p> <p>The requirements on the ‘Betriebsleiter’ laid down in the legal acts define the following:</p> <ul style="list-style-type: none"> <li>- The basic and technical knowledge, training content and training hours</li> <li>- The appointment of at least one ‘Betriebsleiter’ and one deputy</li> <li>- The mandatory approval of the authority and the to be followed process to receive this approval (list of application documents to be submitted)</li> <li>- The tasks and responsibilities</li> <li>- The mandatory annual reporting on activities</li> </ul>
<b>6. 1.2. Analysis performed</b>
<p>Following the Agency preliminary opinion that the national rules in object are not in line with the EU legal framework, the Austrian NSA reported that in its opinion the requirements defined in the EisbVO on the ‘Betriebsleiter’ qualification are not as detailed laid down in EU legislation and that this topic is already part of national legislation since 1957, updated in 2003 (version 25.01.2021) and notified as national rule conform to Art. 8 of Directive 2016/798. The national rule falls also under protection of workers conform Directive 89/391/EEC.</p> <p>The Agency however remained of its negative opinion given that the railway undertakings should define, as part of their SMS, the roles and responsibilities of those carrying out safety-related tasks, identify the relevant competencies and establish training programmes to develop and maintain their competencies. It is in fact an exclusive task of the company to decide on the specificities of safety-related tasks, as this is highly dependent on each company’s operational context as well as specific and tailored-made risk evaluation and assessment.</p> <p>The Austrian NSA shall use all available legal instruments, such as Commission Delegated Regulation (EU) 2018/761 establishing common safety methods for supervision by national safety authorities, to verify through their supervision activities the ability of the railway undertaking’s Safety Management Systems to function properly and address all relevant risks, including those arising from the human and organisational factors and impacting the competence management system.</p> <p>The Agency believes that responsibilities for risk management are well covered by EU legal acts and that it should be the company and not necessarily a single person who bears the relevant responsibilities unless the SMS provides such a concentration of responsibility.</p>
<b>7. 1.3. Assessment of impacts</b>
<p>The adopted national rules by Austria on ‘Betriebsleiter’ requirements fall within the scope of the Light Impact Assessment ‘Revision of the Common Safety Methods on Conformity Assessment and the Common Safety Methods on Supervision’ performed by the Agency in February 2017 and of the Full Impact Assessment on the TSI OPE Revision carried out in 2018. The impacts were therefore already adequately assessed and it is confirmed that the adopted rules compromise uniformity of application of well-established EU requirements on SMS, increase the risk of low transparency of the national rules framework that stakeholders have to comply within Austria as well as interoperability of RUs. In particular, the rules in object impose administrative, training, educational and language requirements on individuals working as ‘Betriebsleiter’. Furthermore, the rules impose a specific placement and reporting lines of the ‘Betriebsleiter’ within the company structure. All these requirements have a negative impact on</p>

interoperability given that they are Austria-specific and generate compliance costs for RUs. For example, a RU holding a valid SSC and with a perfectly compliant SMS which wishes to extend its area of operations to Austria would need to transform its internal organisation, potentially recruit a ‘Betriebsleiter’ certified, trained and fluent in German and amend its SMS according to the national rules in object. Simillar national rules adopted in more MSs would require RUs operating in different countries to have an operation manager ‘authorised’ in each country (following specific requirements and trainings), instead of defining such operation manager requirements within a risk-based approach that is company specific.

Regarding safety, the national rules in object force the national competent authorities to perform legal and administrative checks as well as examinations of individuals which are resource-intensive; such resources could be shifted/allocated to perform supervision activities of the Safety Management Systems. It is concluded that the national rule in subject generates important negative impacts on interoperability, undue compliance costs for RUs, as well as it risks to discourage RUs entering the Austrian market.

**8. 1.4. Stakeholders affected**

The most affected stakeholder are the railway undertakings.

Railway undertakings (RU)	<input checked="" type="checkbox"/>	Member States (MS)	<input checked="" type="checkbox"/>
Infrastructure managers (IM)	<input type="checkbox"/>	Third Countries	<input type="checkbox"/>
Manufacturers	<input type="checkbox"/>	National safety authorities (NSA)	<input checked="" type="checkbox"/>
Keepers	<input type="checkbox"/>	European Commission (EC)	<input type="checkbox"/>
Entity Managing the Change (EMC)	<input type="checkbox"/>	European Union Agency for Railways (ERA)	<input type="checkbox"/>
Notified Bodies (NoBo)	<input type="checkbox"/>	Shippers	<input type="checkbox"/>
Associations	<input type="checkbox"/>	Other (Please specify) ...	<input type="checkbox"/>

**2. Preferred option**

**9. 2.1. Recommendation**

It is confirmed a negative assessment of the national rule in object by Austria.